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Taking the Literary Turn

Patrick O. Gudridge
University of Miami School of Law, pgudridg@law.miami.edu

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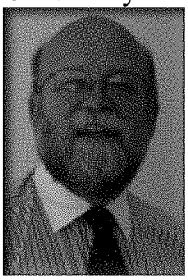
Elliott Visconsi, Lines of Equity: Literature and the Origins of Law in Later Stuart England (Cornell University Press: 2008).



Pat Gudridge

> This is a book about the fictionalization of the origins of law in later Stuart England. My focus is on crucial literary texts such as John Milton's Paradise Lost and John Dryden's Indian Emperour, works devoted to demanding of the audience a set of structured interpretive deliberations about the first principles of government, the charismatic utterance of law, and the transition from savagery to civility. At the heart of such an intellectual program is the norm and practice of equity.... Equity is a moral principle (equal justice, fairness), an interpretive method (summoning the original intention or spirit of a law in order to judge fully particular acts or events), and a gesture of sovereign mercy (relaxing the rigorous letter of the law in order to ensure justice). For the writers I study, equity is habit of thought that may be cultivated through fictional methods. ... I take as given the claim ... that in the later Stuart period, serious literary texts are a crucial language for the public constitution of the legal norms and conceptions of sovereignty, subjecthood, and political authority. Moreover, I share the view that literary texts are often the most effective and lasting language for explaining and legitimating legal regimes. (1-2)

This is a book I like a lot in part because of who – professionally – Elliott Visconsi is. He wrote the book while an assistant professor of English. *Lines of Equity* is careful tenure track work. Visconsi announces right at the beginning ("I take as given") that he is working within a field already mapped (naming and footnoting his predecessors in the passage I delete.) And he was also an assistant professor of English *at Yale* – making his way, therefore, within one of the most established, celebrated, central English departments in American academia. There is nothing radical, it appears – or not much – in Visconsi's project. Constitutional thinking is, apparently, a pretty much accepted starting point for exploring the organization and power of literary works. Professor Visconsi cheerfully announces on his Yale webpage that he will "spend a year studying US and comparative constitutional law at Yale Law School courtesy of a Mellon Foundation New Directions Fellowship. The major focus of my current research touches on the cultural and legal history of the separation of church and state...."

Those of us who think that constitutions should be thought about, written about, generally argued over, by reading legal documents like constitutions (for example) or judicial opinions, supplemented (but mostly only supplemented) by some references to history or political theory or economics or sociology (for example) have to wonder: What are we to make of our new cousins (new to many of us anyway, I think)? Perhaps they are safely far removed, we will wave cheerfully when we notice them, but don't really need to take them seriously.

Milton and Dryden and friends, after all, are safely famously long dead – right subjects for historical appreciation of whatever form, but not part of the present in which we think ourselves to be participating. But the problem – and this is another reason why I like Visconsi's book a lot – is that Visconsi's ways of putting things really do resemble ours (or some of ours) quite a bit.

Consider this passage in Elliott Visconsi's discussion of *Paradise Lost* – both bravura and dauntingly English professor-ish:

> Let us recall here that equity is, in early modern political and rhetorical theory, the act of summoning the spirit of an utterance to create worldly justice. It is both a political norm to be practiced in good government and an inherently personal (and sometimes dangerously) subjective deliberation. The two prongs – the public and private strains – of equity are reflected in the formal structure of Paradise Lost. On the one hand, Milton offers a heterodox, unstable invitation to deep and challenging deliberations over the spirit of divine utterance – this is the paideic method with which Milton corrects his wayward audience or cultivates revolutionary readers. … [Bow to Stanley Fish omitted.] On the other hand, the poem makes an unambiguous, strident, and orthodox argument for divine equity. … [T]his rhetorical (rather than hermeneutic) appeal is the space within which Milton argues for equity as governmental norm. Taken together, the interpretive and the rhetorical appeal in Paradise Lost are part of a broader commitment to equity as governmental norm and personal ethos. The poem proposes simultaneously, and without contradiction, a private language of unstable, heterodox, individual deliberation and a normative public language…. (99-100)

Visconsi's Milton is not quite Mike Seidman, of course – but there's plainly a family resemblance. (Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 Yale L.J. 1006 (1987).) What if we acknowledge the resemblance as something other than accidental – just another grilled cheese sandwich picture of Jesus? What if legal thinking about constitutions is understood to overlap literary thinking about constitutions? This is not an entirely surprising question, of course. Sometime ago, Robert Ferguson introduced us to the idea of "the literature of public documents," and put the Constitution at the core of this canon. But his reading was readily bracketed as history. So too Visconsi's if we want it to be. What if we don't?

I don't mean that we should treat *Paradise Lost*, say, as necessarily a precursor text (although that may make sense.) Rather, I think that the idea of the constitution as literary may have implications for the idea of the constitution as legal.

- Reading in a context we recognize as literary, we are entirely comfortable placing any particular text within a larger stream – whether precursors or post-productions – reading each individual presentation as both impressed upon and impressing upon others, more or less independently of chronological order, seeking to catch hold of some especially resonant gloss. There is no need for "living constitution" fictions and every possibility of inter-relating constitutional documents as such with cognates – say, the Declaration of Independence, Lincoln's several masterpieces. Cascades of Supreme Court opinions, epochal statutes, and the like.
- Literary culture, we know, coexists provocatively (overlaps) popular culture. Influences – either way – may be both oblique and real. (We all remember, don't we, Meryl Streep's oration on blue sweaters in *Devil Wore Prada*?) Highly worked, in many ways esoteric, academic and judicial constitutional readings might be understood similarly – not as opposites in some sense, but as sometimes mutually influencing, interacting constitutional streams. The place of the great civil rights marches of the 1960s – obviously in some sense constitutional, but pretty much ignored as such in much – not all, obviously

enough – academic and judicial constitutional writing – becomes clearer: as constructions, assemblies, demonstrations, among other things, of the form and function of provocation as a medium of free speech. Influence may also run back and forth: "One person, one vote" is first of all a formula encoding a notably complex and controversial reading of section one of the Fourteenth Amendment; it becomes foundational within popular constitutional culture; by the time of *Bush v. Gore* it appears to have acquired a significance (resisted also, to be sure) independent of its judicial origin, now become rhetorically elemental, the constitutional equivalent of an emoticon.

- Literary reading is play, it seems. But part of the accomplishment of Visconci and his predecessors is a demonstration that this play elaborates sometimes within highly charged political and social scenes, as acts within those scenes, as acts therefore not always without consequence. Play looks like law – like law looks to Austin, Cover, etc. Albion Tourgee introduces the idea of "color-blind" in a novel, carries it over into a brief, the phrase (of course) then taken over by Justice Harlan in the *Plessy* dissent, in the late twentieth century and even now recast as incendiary, a flash point fueling and refueling repeatedly blooming bursts of constitutional, political, and social conflict.

Elliott Visconsi's book provokes, offers a new background, may well change our sense of what we take for granted. I like this book a lot.

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